

**California Regional Water Quality Control Board
Santa Ana Region**

RESOLUTION NO. R8-2007- 0024

**Resolution Amending the Water Quality Control Plan for the Santa Ana River
Basin to Incorporate Organochlorine Compounds
Total Maximum Daily Loads (TMDLs) for San Diego Creek,
Upper and Lower Newport Bay, Orange County, California**

WHEREAS, the California Regional Water Quality Control Board, Santa Ana Region (hereinafter, Regional Board), finds that:

1. An updated Water Quality Control Plan for the Santa Ana River Basin (Basin Plan) was adopted by the Santa Ana Regional Water Quality Control Board (Regional Board) on March 11, 1994, approved by the State Water Resources Control Board (SWRCB) on July 21, 1994, and approved by the Office of Administrative Law (OAL) on January 24, 1995.
2. The Basin Plan specifies the following beneficial uses for San Diego Creek, Reach 1: water contact recreation (REC1); non-contact water recreation (REC2); warm freshwater habitat (WARM); and wildlife habitat (WILD).
3. The Basin Plan specifies the following intermittent beneficial uses for San Diego Creek, Reach 2: water contact recreation (REC1); non-contact water recreation (REC2); warm freshwater habitat (WARM); wildlife habitat (WILD); and groundwater recharge (GWR).
4. The Basin Plan specifies the following beneficial uses for Upper Newport Bay: water contact recreation (REC1); non-contact water recreation (REC2); commercial and sportsfishing (COMM); preservation of biological habitats of special significance (BIOL); spawning, reproduction, and development (SPWN); wildlife habitat (WILD); rare, threatened, or endangered species (RARE); marine habitat (MAR); shellfish harvesting (SHEL); and estuarine habitat (EST).
5. The Basin Plan specifies the following beneficial uses for Lower Newport Bay: water contact recreation (REC1); non-contact water recreation (REC2); commercial and sportsfishing (COMM); spawning, reproduction, and development (SPWN); wildlife habitat (WILD); rare, threatened, or endangered species (RARE); marine habitat (MAR); shellfish harvesting (SHEL); and navigation (NAV).
6. The Basin Plan specifies the following narrative water quality objectives pertaining to toxic substances applicable to inland surface waters and enclosed

bays and estuaries: 1) *Toxic substances shall not be discharged at levels that will bioaccumulate in aquatic resources to levels which are harmful to human health*; and, 2) *The concentrations of toxic pollutants in the water column, sediments or biota shall not adversely affect beneficial uses.*

7. Data from the State Mussel Watch Program, Toxic Substances Monitoring Program, and other water quality monitoring programs provided evidence that one or more of these narrative objectives for toxic pollutants are being or may be violated in San Diego Creek, Upper Newport Bay and Lower Newport Bay. Accordingly, beginning in the 1990's, the Regional Board placed these waterbodies on the Clean Water Act (CWA) §303(d) list of impaired waters, triggering the need for development and implementation of Total Maximum Daily Loads (TMDLs) or other equally effective control actions. The purpose of the TMDLs is to assure that water quality standards are achieved. State law requires that an implementation plan accompany the TMDLs to describe the actions that are to be taken, together with a compliance schedule, if appropriate, to insure that the TMDLs are met and that compliance with water quality standards is achieved.
8. On June 14, 2002, in response to a consent decree, the U.S. Environmental Protection Agency (USEPA) promulgated technical TMDLs for toxic pollutants, including certain organochlorine compounds, in Upper and Lower Newport Bay and San Diego Creek. Consistent with CWA §303(d), USEPA evaluated all readily available data for San Diego Creek and Newport Bay, and used a weight of evidence approach to determine which organochlorine compounds warranted TMDLs. The USEPA technical TMDLs do not include an implementation plan.
9. Subsequent to the USEPA promulgation of technical organochlorine compounds TMDLs for Upper and Lower Newport Bay and San Diego Creek, the State Water Resources Control Board (SWRCB) adopted the "Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List" (State Listing Policy) in September 2004. The State Listing Policy specifies a methodology for placing a water body on the CWA §303(d) list that differs from that used by the USEPA. Regional Board staff conducted an independent impairment assessment, applying the State Listing Policy methodology to relevant data, including data that became available subsequent to USEPA's development of the technical organochlorine compounds TMDLs. Based on that assessment and a separate impairment assessment conducted by State Water Resource Control Board staff, the approved 2004-2006 CWA §303(d) list identifies waterbody-organochlorine compound combinations for San Diego Creek and Upper and Lower Newport Bay that differ from those identified by the USEPA.
10. Pursuant to the revised CWA §303(d) listings and Clean Water Act §303(d)(3), the Regional Board has developed TMDLs for: DDT and toxaphene for San Diego Creek and tributaries; chlordane, DDT, and PCBs for Upper Newport Bay;

and, chlordane, DDT, and PCBs for Lower Newport Bay. In addition, the Regional Board developed informational TMDLs for chlordane and PCBs for San Diego Creek and its tributaries. While impairment due to chlordane and PCBs was not found in San Diego Creek, the informational TMDLs are appropriate because San Diego Creek is the major tributary to Newport Bay. No action to implement the informational TMDLs is required but the informational TMDLs may forward action to address downstream chlordane and PCBs impairments.

11. The TMDL Basin Plan amendment shown in Attachment 2 to this Resolution was developed in accordance with Clean Water Act §303(d) and Water Code Section 13240 *et seq.* The amendment is proposed for incorporation into Chapter 5 “Implementation”, of the Basin Plan. The proposed TMDL Basin Plan amendment includes background information concerning the water quality impairment being addressed and the sources of organochlorine compounds to San Diego Creek and Upper and Lower Newport Bay. The proposed TMDLs are supported by a detailed report prepared by Regional Board staff and titled “Total Maximum Daily Loads for Organochlorine Compounds, San Diego Creek: Total DDT and Toxaphene. Upper and Lower Newport Bay: Total DDT, Chlordane, Total PCBs”, November 17, 2006 (hereinafter, “TMDL Report”). Revisions to the proposed TMDLs described in the TMDL Report were made in response to comments. These revisions are described in supplemental staff reports dated April 20, 2007 and September 7, 2007.
12. The TMDL Basin Plan amendment will assure the reasonable protection of the beneficial uses of surface waters within the Region and is consistent with the State antidegradation policy (SWRCB Resolution No. 68-16).
13. The adoption and implementation of these TMDLs is necessary to reduce loadings of organochlorine compounds to San Diego Creek and Upper and Lower Newport Bay, and to address water quality impairments that arise therefrom. This action is necessary to assure conformance with state and federal law and regulation, which require that surface water quality standards be achieved and protected.
14. The proposed amendment meets the “Necessity” standard of the Administrative Procedure Act, Government Code, Section 11352(b).
15. The Regional Board submitted the relevant technical documents that serve as the basis for the proposed amendment to an external scientific review panel and has considered the comments and recommendations of that panel in drafting the amendment.
16. The proposed amendment will result in revisions to the Basin Plan Chapter 5 “Implementation”.

17. The Regional Board discussed this matter at workshops conducted on December 1, 2006 and April 20, 2007 after notice was given to all interested persons in accordance with Section 13244 of the California Water Code. Based on the discussion at those workshops, the Board directed staff to prepare the appropriate Basin Plan amendment and related documentation to incorporate the San Diego Creek and Upper and Lower Newport Bay organochlorine compounds TMDLs.
18. The Regional Board prepared and distributed written reports (staff reports) regarding adoption of the Basin Plan amendment in accordance with applicable state and federal environmental regulations (California Code of Regulations, Section 3775, Title 23, and 40 CFR Parts 25 and 131).
19. The Regional Board has considered the costs associated with implementation of this amendment, as well as the costs resulting from failure to implement organochlorine compound control measures necessary to prevent adverse effects on beneficial uses. The implementation plan in the Basin Plan, which includes extended compliance schedules and employs a phased TMDL approach to provide for refinement based on additional studies and analyses, will ensure that implementation expenditures are reasonable and fairly apportioned among dischargers.
20. The process of basin planning has been certified by the Secretary for Resources as exempt from the requirement of the California Environmental Quality Act (CEQA) (Public Resources Code Section 21000 et seq.) to prepare an Environmental Impact Report (EIR) or Negative Declaration (ND). In lieu of an EIR or ND, the Regional Board must comply with applicable regulations on exempt regulatory programs. These regulations require the preparation of a substitute environmental document (SED) to take the place of an EIR or ND. Consistent with this requirement, the Regional Board prepared an SED dated July 25, 2007. The Regional Board distributed the SED for public review in compliance with CEQA. Along with the SED, the Regional Board circulated the TMDL Report and supplemental staff reports. The SED complies with applicable CEQA requirements to describe the proposed project, assess the potential adverse environmental effects of implementation of reasonably foreseeable methods of compliance, identify mitigation measures and evaluate alternatives.
21. The Substitute Environmental Document (SED) comprises a First Tier environmental document as called for by Public Resources Code section 21159 and the California Code of Regulations, Title 14, section 15187. When and if specific projects are proposed to achieve compliance with the requirements of the organochlorine compounds TMDLs shown in Attachment 2 to this Resolution, these projects shall be reviewed, as required in conformance with applicable CEQA regulations, on a project-specific basis.

22. As described in the SED, the implementation of reasonably foreseeable methods of compliance with the organochlorine compounds TMDLs has the potential to result in significant adverse environmental effects with respect to certain Air Quality, Biological Resources, Noise, Transportation/Traffic, and Utilities and Services considerations. While mitigation measures can be employed to substantially lessen the potentially significant impacts identified in the SED, the effects cannot be wholly avoided (i.e., reduced to less than significant levels).
23. Measures that are available to mitigate the potential adverse environmental effects identified in the SED can and should be required by local, regional, state and federal lead and responsible agencies through their CEQA/NEPA, planning, project approval, CWA Sec. 401 certification and/or permitting (where necessary) processes. The Regional Board will identify appropriate mitigation measures in response to site-specific CEQA analysis of projects proposed to implement the TMDLs. Appropriate mitigation requirements will be incorporated in discharge requirements issued to regulate specific implementation projects and/or in Clean Water Act Section 401 water quality certifications. Mitigation monitoring will also be required to judge the efficacy of the measures and need for improvement. Discharge requirements, 401 certifications, or other regulatory actions of the Regional Board as necessary, will require improvements to the mitigation measures and/or the implementation of these measures if and as the need is demonstrated by applicable monitoring requirements.
24. Attachment 1 to this Resolution is the "CEQA Findings of Fact and Statement of Overriding Considerations for the Organochlorine Compounds Total Maximum Daily Loads for San Diego Creek, Upper Newport Bay and Lower Newport Bay Substitute Environmental Document" (hereafter "Findings") prepared in order to satisfy the requirements of Public Resources Code section 21081.
25. As the proposed Findings demonstrate, all of the potentially significant environmental effects associated with the TMDLs can either be substantially lessened or avoided by the mitigation measures proposed in the SED.
26. As the proposed Findings also demonstrate, most of the potentially significant environmental effects of the TMDLs can be fully avoided (i.e., rendered less than significant) by the adoption of feasible mitigation measures or by mitigation measures that can and should be implemented by other agencies.
27. As the proposed Findings also demonstrate, the mitigation measures that can and should be implemented by other agencies address impacts outside the regulatory jurisdiction of the Regional Board under the Water Code.
28. Those potentially significant effects that have not been fully avoided can be substantially lessened by the adoption of feasible mitigation measures, although those effects still remain significant and unavoidable.

29. The Regional Board has determined, pursuant to Public Resources Code section 21081(a)(3), that certain mitigation measures or alternatives proposed in the SED are infeasible within the meaning of CEQA.
30. Because the Regional Board will incorporate in discharge requirements, 401 certifications and other regulatory actions as necessary mitigation requirements sufficient to at least substantially lessen all significant environmental effects, the Board is not required to assess whether any of the alternatives in the SED are environmentally superior with respect to the significant effects of the Project, or whether any environmentally superior alternative is feasible within the meaning of CEQA.
31. The Regional Board has nevertheless chosen to include within the Findings a discussion as to whether any of the alternatives discussed in the SED are both feasible and environmentally superior to the TMDLs as proposed with respect to the significant unavoidable effects of the TMDLs.
32. Public Resources Code section 21081(b), and CEQA Guidelines section 15093 require the Regional Board to adopt a "statement of overriding considerations" before approving a project with significant environmental effects, where the Regional Board has concluded that such effects remain significant and unavoidable notwithstanding the incorporation of all mitigation measures and alternatives found to be feasible.
33. The Regional Board desires, in accordance with CEQA, to declare that, despite the occurrence of significant unavoidable environmental effects associated with the TMDLs, there exist certain overriding economic, social, and other considerations for approving the TMDLs that the Regional Board believes justify the occurrence of those impacts and render them acceptable.
34. Attachment 1 to this Resolution includes a statement of overriding considerations specifying the economic, social, and other benefits that render acceptable the significant unavoidable environmental effects associated with the TMDLs.
35. The Regional Board recognizes its obligation, pursuant to Public Resources Code section 21081.6(a), to ensure the monitoring of those feasible mitigation measures outlined in the proposed Findings.
36. The TMDLs contain monitoring provisions prepared in order to comply with Water Code section 13242(c). Monitoring requirements will be incorporated in discharge requirements, Clean Water Act Section 401 certifications and other necessary regulatory actions taken by the Regional Board to assure that the mitigation requirements are effective.

37. Water Code Section 13421 requires a Regional Board, in establishing water quality objectives, to consider the costs of compliance. (*City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392, 1415.) Where, as here, the Regional Board is considering TMDLs that will implement an existing water quality objective rather than establishing a new one, Water Code Section 13241 does not apply. The Regional Board has nevertheless considered the costs of compliance with the TMDL. That analysis, presented in Section 9 of the November 17, 2006 Staff Report for the TMDL and in the SED, fully satisfies any obligation to address Water Code Section 13241.
38. The Basin Plan amendment must be submitted for review and approval by the State Water Resources Control Board (SWRCB), Office of Administrative Law (OAL) and U.S. Environmental Protection Agency (USEPA). Once approved by the SWRCB, the amendment is submitted to OAL and USEPA. The Basin Plan amendment will become effective upon approval by OAL. A Notice of Decision will be filed.
39. The Notice of Filing, Notice of Public Hearing, the TMDL Report, Substitute Environmental Document, and the draft amendment were prepared and distributed to interested individuals and public agencies for review and comment, in accordance with state and federal regulations (23 CCR 3775, 40 CFR 25 and 40 CFR 131).
40. For the purposes of specifying compliance schedules in NPDES permits for effluent limitations necessary to implement these TMDLs, the schedules specified in these TMDLs shall govern, notwithstanding other compliance schedule authorization language in the Basin Plan.
41. On September 7, 2007, the Regional Board held a public hearing to consider the Basin Plan amendment. The Notice of Public Hearing was distributed on July 25, 2007 to all interested persons and published in accordance with Water Code Section 13244.
42. At the public hearing, the Regional Board received comments from interested stakeholders, government agencies, and the public. The Regional Board has considered those comments.
43. The Regional Board chooses to exercise its discretion to approve the TMDLs as modified through the adoption of feasible mitigation measures and through the findings that other mitigation measures can and should be implemented by other agencies.

NOW, THEREFORE BE IT RESOLVED THAT:

1. In approving this Resolution, the Board adopts the Findings, as set forth in Attachment 1, in order to satisfy its obligations under Public Resources Code sections 21002 and 21081 and CEQA Guidelines sections 15091 and 15093.
2. The Regional Board adopts the amendment to the Water Quality Control Plan for the Santa Ana River Basin (Region 8), as set forth in Attachment 2.
3. The Executive Officer is directed to forward copies of the Basin Plan amendment to the SWRCB in accordance with the requirements of Section §13245 of the California Water Code.
4. The Regional Board requests that the SWRCB approve the Basin Plan amendment, in accordance with Sections §13245 and §13246 of the California Water Code, and forward it to the OAL and U.S. EPA for approval.
5. If, during its approval process, Regional Board staff, SWRCB or OAL determines that minor, nonsubstantive corrections to the language of the amendment are needed for clarity or consistency, the Executive Officer may make such changes, and shall inform the Board of any such changes.
6. The Executive Officer is directed, at the time of filing and posting the Notice of Decision, to take steps to promptly ensure payment of \$850 to the Department of Fish and Game for its review of the SED or to file a Certificate of Fee Exemption, whichever is appropriate.

I, Gerard J. Thibeault, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of a resolution adopted by the California Regional Water Quality Control Board, Santa Ana Region, on September 7, 2007.

Gerard J. Thibeault
Executive Officer